No. 86 1501

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

THE CITY OF McKEESPORT and
WILLIAM WEISSERT,

Petitioners,

vs.

REBECCA L. CUNNINGHAM, an individual,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID H. TRUSHEL, ESQUIRE*
DEBORAH D. OLSZEWSKI, ESQUIRE
TRUSHEL, KLYM & ASTI
Attorneys for Petitioners
1207 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 232-3800

* *Counsel of Record*

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

Question Presented for Review

I. Whether the decision of the United States Court of Appeals for the Third Circuit misapplied and misinterpreted the holding of this Court in *City of Riverside, et al. v. Rivera, et al.*, _____ U.S. _____, 106 S.Ct. 2686 (1986)?

List of Parties

PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT DISMISSED PRIOR TO TRIAL

Samuel R. Vedrovic

Gerald F. Boyle

Joseph P. Graziano

James Weatherington

Charles A. Sharbaugh

Nicholas J. Skezas

Carolyn O. Young

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT NOT PARTIES TO THE APPEAL

Robert Clyde Omslaer, d/b/a Omslaer Wrecking Company

TABLE OF CONTENTS.

	Page
Question Presented for Review	i
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	2
Statement of the Case	3
Reason for Granting the Writ	5
I. The decision of the Court below is a misinterpretation and misapplication of this Court's decision in *Riverside*, and not in conformance with this Court's Order of July 7, 1986	5
Conclusion	12
Appendix:	
Order of the Supreme Court of the United States, dated July 7, 1986	1a
Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated December 12, 1986	2a
Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984	4a

Page

TABLE OF AUTHORITIES.

CASES.

City of Riverside v. Rivera, _____ U.S. _____, 106 S.Ct. 2686 (1986) ..... *passim*
Hensley v. Eckerhart, 461 U.S. 424, 105 S.Ct. 1933, 76 L.Ed. 2d 40 (1983) 7,10,11
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (C.A.5, 1974) 7

STATUTES.

Civil Rights Act of 1871, 42 U.S.C. Section 1983 ... 3
Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988 2,5
28 U.S.C. Section 1254(1) 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The Order of this Court is not reported but appears in the Appendix at 1a.

The Opinion of the United States Court of Appeals for the Third Circuit is not reported but appears in the Appendix at 2a-3a.

The Opinion of the United States District Court for the Western District is not reported but appears in the Appendix at 4a-9a.

Statement of Jurisdiction

This Court's Order granting Petitioner's Petition for Writ of Certiorari and remanding the case for consideration in light of the decision in *City of Riverside v. Rivera*, _____ U.S. _____, 106 S.Ct. 2686 (1986) was entered on July 7, 1986.

The decision of the Court of Appeals was issued on December 12, 1986. This Petition for Writ of Certiorari has been filed within ninety (90) days of that date. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved

None.

Statutes Involved

The Civil Rights Attorney's Fees Award Act of 1976 provides as follows:

> "... The Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988.

Statement of the Case

This is a civil action for damages brought pursuant to the Civil Rights Act of 1871, 42 U.S.C., Section 1983 by an individual against the City of McKeesport and other defendants.

Respondent claimed damages as the result of the March, 1981 demolition of an uninhabited and previously condemned house and garage owned by her. She paid $2,700.00 for the property and had invested approximately $2,000.00 in its renovation at the time of its demolition. She proposed to invest another $15,000.00 in the property, by way of a federal IMPAC loan, in order to make the house habitable.

Respondent claimed her civil rights had been violated as a result of the demolition. Petitioners never contested that the house and garage had been demolished by the City of McKeesport, rather, they contested whether or not such actions amounted to a violation of plaintiff's civil rights and also contested the amount of damages claimed by Respondent.

Respondent's initial demand to settle the case was $57,800.00. She based this demand on her estimate of the post-renovation fair market value of the house and garage as being $40,000.00. She also included the "loss of use" of the $15,000.00 IMPAC loan, even though she had never received the funds, nor was ever obligated to repay them. She also claimed damages of $250.00 per month for apartment rental for herself and the lost income of $50.00 per month for garage rental which she allegedly would have secured after renovation.

Prior to trial, Petitioners offered $15,000.00 to settle the case, which was refused. The District Court ruled, also prior to trial, that the $40,000.00 estimate of the post-renovation fair market value of the property was not a proper item of damage. Respondent refused to accept the $15,000.00 up to and through trial and was ultimately awarded $17,000.00. Neither Respondent nor Petitioners filed an Appeal from this Award. Respondent subsequently filed for attorney's fees in the amount of $33,887.50.

Petitioners contested Respondent's right to attorney's fees based on the Federal Court decisions regarding denial of attorney's fee Awards in cases similar to Respondent's. In the alternative, Petitioners challenged the amount of fees requested based on the Federal Court decisions regarding the relation between the nature and amount of benefit conferred on the plaintiff and the amount of fees requested.

The District Court Judge, who handled the entire matter from the filing of the suit, through discovery and trial, awarded $5,875.00 in attorney's fees, plus costs, in March of 1984. Respondent appealed the Opinion of the District Court Judge, which was reversed, and the Third Circuit ordered the District Court to award attorney's fees in the amount of $33,887.50 and reimbursement of costs in the amount of $781.05.

Respondent's attorneys have already petitioned the District Court for an additional $11,968.70 for time and costs expended on their Appeal and in litigating the Fee Petition.

REASON FOR GRANTING THE WRIT

I. The decision of the Court below obviously conflicts with the decision of this Court in *City of Riverside v. Rivera*, _____ U.S. _____, 106 S.Ct. 2686 (1986). That decision was whether or not the fee Award rendered by the District Court was "per se unreasonable" since it exceeded the amount of damages recovered by the plaintiff. By reinstating their prior Order, the Third Circuit has made this Court's action in granting the previously filed Writ for Certiorari a nullity. The Circuit has flaunted this Court's Order of July 7, 1986.

Once again, the case before this Court is an example of the judicial process run amok and the nightmare of litigation which continually erodes and undermines the legitimacy of and confidence in the American legal system as a whole.

42 U.S.C. Section 1988, *et seq.*, makes it clear that an award of attorney's fees is meant to be compensatory rather than punitive. The decision of the Court below is so clearly designed to be punitive in nature, as to virtually preclude the future defense of cases such as the one at hand. The intent of the Court below to punish Petitioner for defending this case is becoming painfully obvious with each decision. They have pointedly ignored this Court's instructions in granting the previously filed Writ for Certiorari and returning the case for reconsideration.

Briefly, Petitioners mistakenly demolished two structures owned by Respondent. She sustained approximately $4,700.00 of actual damages. Yet, with the assistance of legal counsel, she demanded a

settlement in excess of $57,000.00 up to and through trial, based upon items of damages which were obviously improper and largely unsubstantiated.

Petitioners *never* contested their liability for the demolition. The only hotly contested issues, pressed unrelentingly, by the Respondent, were that (1) the actions of Petitioners amounted to a civil rights violation; and (2) she was entitled to show a jury unsubstantiated damages which were more than ten times the amount she actually sustained.

The entire lawsuit was never handled with an eye towards restoring to plaintiff that which she had lost; rather, it was prosecuted solely to avail Respondent and her counsel of the protective cloak of the Civil Rights Act and the recovery of a windfall, both for Respondent in the amount of damages claimed and her attorneys, in run-a-way legal fees.

Petitioner's refusal to submit to the demand, which was ultimately vindicated by an award to Respondent almost identical to the offer, has cost them the penalty of paying the attorney's fees generated by Respondent's unreasonable and unrealistic prosecution of her claim. These attorney's fees now approach *$50,000.*

The punitive effect of the Third Circuit's decision absolutely precludes the defense of cases such as this where the plaintiff can prove a civil rights violation in only the most technical sense. Once a plaintiff has crossed this hurdle, the demand can be totally unrelated to the damages, he or she can unreasonably refuse to compromise, and blithely proceeding to trial without any consideration of the legal costs or time involved. The decision of the lower Court condones and implicitly encourages the unreasonable and unrealistic prosecution

of suits by rewarding Respondent for this type of activity and penalizing Petitioners for their unwillingness to submit to such demands.

The exorbitant amount of legal time incurred in this case was *entirely* due to Respondent's insistence that she was entitled to recover more than ten times the amount of damages she sustained.

The Trial Judge in the Western District was aware of this and had first-hand knowledge of the posture assumed by the plaintiff throughout the litigation, and reduced the Fee Petition accordingly.

The issue decided by this Court in *City of Riverside, supra,* and the case at hand are identical. The central issue being whether or not the Appellate Court could disturb the judgment of the District Court.

This Court discussed in *Riverside, supra,* p. 2691, the application of *Hensley v. Eckerhart,* 461 U.S. 424, 105 S.Ct. 1933 (1983), in determining what is a reasonable fee Award. This Court also discussed the application of *Johnson v. Georgia Highway Express, Inc.,* 488 F. 2d 714 (C.A. 5, 1974), which set out 12 factors to consider in calculating a reasonable attorney's fee. *Id.*

After a thorough cogitation of all of these factors, this Court found that the District Court had not abused its discretion and that the Award of fees at the District level was not unreasonable. Accordingly, the Court rejected Appellant's argument that the fee Award should be proportional to the amount of damages recovered.

Petitioners here argue that the impact of the *Riverside* case dictates that the Award of the District Court be affirmed. Appellant in *Riverside* argued that the Court of Appeals' affirmance of the District Court Award of fees

was improper because it found the District Court's Award to be reasonable. This Court rejected that argument, even though the award on its face, appeared unreasonable to at least one member of the Court. In the instant case, the United States Court of Appeals for the Third Circuit found the District Court Award to be *unreasonable* and substituted its judgment for that of the District Court even though there was *no* finding that the award was unreasonable. *City of Riverside* clearly mandates that the judgment of the Third Circuit be vacated and the District Court's judgment be affirmed.

Respondents in the instant case argued that it was unreasonable for the District Court to reduce the amount of fees requested. The District Court made such a reduction by considering the factors mandated by the *Riverside* decision. The District Court considered:

(1) The time and labor required, and found that given the straightforward theory of liability and measure of damages as well as the concession of liability on the part of the defendants, that the amount of time spent was excessive and duplicative;

(2) The novelty and difficulty of the questions, finding that there were no novel or complex legal or factual issues;

(3) The skill requisite to perform the legal service properly decided that the relative inexperience of Respondent's counsel was reflected in the number of hours devoted to a relatively simple action;

(4) Whether the fee was fixed or contingent, finding that from the outset Respondent had a good prospect for recovery and that a contingency adjustment was warranted;

(5) The experience, reputation, and ability of the attorneys, finding that the relative inexperience of Respondent's counsel in handling the matter warranted a reduction of the hourly rate to $50.00 per hour; and

(6) The undesirability of the case, finding that Respondent had a good prospect for recovery, as well as finding that the instant case advanced no new theories of law which would serve the public interest nor showed any indication of bad faith in the defense of the action and that the Respondent sustained an isolated act for which she was adequately compensated.

Petitioners believe that the impact of the *Riverside* case precludes the Third Circuit Court of Appeals from finding that the District Court Award was unreasonable and, in fact, mandates that the District Court's Award be undisturbed.

The concurring Opinion of Justice Powell in *Riverside* states that although on its face the Award of the District Court in that case appeared unreasonable, there was no reason to disturb the Findings of Fact or Conclusions made by the District Court. In the instant case, although the standard of review for the Court of Appeals was whether or not there was an abuse of discretion in the Award of the District Court and whether or not that Award was unreasonable, there is *no* such finding that the Award of the District Court was unreasonable. On the contrary, the Third Circuit found only that the District Court had erred.

It may be debated that the holding in *Riverside* is that there is to be no consideration of the proportionality between the amount of fees awarded and the amount of damages. However, the language in the Opinion with respect to that rule is used to support this Court's

decision that the decision of the District Court in *Riverside* was reasonable. If this Court intended that the rule of proportionality be the holding of the case, there was no reason to grant these Petitioner's the Writ of Certiorari since *denial* of the Petition would have been consistent with the Proportionality Rule. Petitioner respectfully believes that this Court granted the Writ since the holding of *Riverside* is that the Appellate Courts may *not* find the District Court's judgment unreasonable where there have been Findings of Fact made in that forum with respect to the fee Award.

This is quite clear in light of this Court's reliance upon *Hensley, supra,* in its Opinion in *Riverside.* The reasoning of the *Hensley* decision is that discretion in determining a fee Award is appropriately vested in the District Court in view of its superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters.

The Third Circuit held that the District Court had no basis for reducing the billing rate or disallowing those hours which the Court had no personal knowledge, stating that the claimed hours and billing were uncontradicted in the record and Petitioners had not challenged their reasonableness. It is unclear to Petitioners what can be more of a challenge to the reasonableness of a fee petition than the argument that Respondent's counsel is entitled to *no* attorneys' fees.

The Circuit considered it inappropriate for a District Court in an adversarial system to reject uncontradicted sworn Affidavits because of reasons not raised by opposing counsel and on the basis of facts which the Trial Court has no personal knowledge. They ignored the Petitioners' Response to the Fee Petition and the indisputable fact that the District Court Judge handled

the litigation from beginning to end and, in fact, had intimate first hand knowledge of the conduct and ability of Respondent's counsel.

The Circuit also recognized the unifying theme of this Court's plurality opinion in *City of Riverside;* that being the plurality satisfaction that the findings of the District Court were sufficiently detailed to justify the fee Award.

At the very least, if the Circuit looked with disfavor on the methods of the District Court in awarding fees to Respondent's attorneys, it should have ordered that Court to rehear the Petition, rather than arbitrarily imposing its own judgment. In failing to do so, it destroyed the carefully crafted parameters of the District Court's discretionary powers as set forth in *Hensley, supra,* and substitutes Appellate review by fiat.

The quandary in which Petitioners found themselves when they last approached this Court for relief has, incredibly, become more bizarre. This situation further fuels public criticism of its legal system as unresponsive, unwieldy, and unjust. The bizarre result of facing what has now escalated to over $45,000.00 of attorney's fees on a simple tort claim with property damage of only $4,700.00, exemplifies all of the worst that can be said about the judicial system and the practitioners who move within it. This situation exemplifies the "liability crisis" in which our municipalities now find themselves.

It is for these reasons that the Court with the most intimate knowledge of the litigation *must* be permitted to exercise its discretion with respect to these matters. A little knowledge is a dangerous thing and, indeed, the little knowledge brought to the Circuit Court in this case, has wrought the ultimate danger—an absolutely ludicrous and irrational result.

The decision directly conflicts with the law that this Honorable Court approved in its decision in *Riverside.*

Conclusion

For these reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeals for the Third Circuit in light of this Honorable Court's Opinion in *Riverside* and upon review that judgment should be reversed.

Respectfully submitted,

DAVID H. TRUSHEL, ESQUIRE*
DEBORAH D. OLSZEWSKI, ESQUIRE
TRUSHEL, KLYM & ASTI
Attorneys for Petitioners
1207 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 232-3800

* *Counsel of Record*

APPENDIX

Order of the Supreme Court of the United States dated July 7, 1986

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JUL 10 1986 12211d

July 7, 1986

Mr. David H. Trushel
1207 Fifth Avenue
Pittsburgh, PA 15219

Re: City of McKeesport, et al.
v. Rebecca L. Cunningham
No. 84-1795

Dear Mr. Trushel:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of City of Riverside v. Rivera, 477 U.S. _____ (1986).

Very truly yours,

JOSEPH F. SPANIOL, JR.
Joseph F. Spaniol, Jr., Clerk

Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated December 12, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3209

REBECCA L. CUNNINGHAM, an individual,
Appellant,

vs.

THE CITY OF MCKEESPORT, WILLIAM WEISSERT, SAMUEL R. VIDNOVIC, GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES HEATHERINGTON, CHARLES A. SHARBAUGH, NICHOLAS J. SKEZAS, CAROLYN O. YOUNG and OMSLAER WRECKING CO., ROBERT CLYDE OMSLAER t/d/b/a OMSLAER WRECKING COMPANY

(D.C. Civil No. 81-1434)

On Appeal from the United States District Court
for the Western District of Pennsylvania

Present: GIBBONS and BECKER, *Circuit Judges* and KATZ,* *District Judge*

ON REMAND FROM THE SUPREME COURT

Present: GIBBONS and BECKER, *Circuit Judges* and KATZ,* *District Judge*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel October 25,

* Hon. Marvin Katz, U.S. District Judge for the Eastern District of PA, sitting by designation.

Appendix—Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated December 12, 1986.

1984. By opinion and judgment filed January 15, 1985, this Court reversed the judgment of the said District Court and remanded for further proceedings. The Supreme Court by orders dated July 7, 1986, granted the appellee's petition for writ of certiorari and vacated the judgment of this Court and remanded for further consideration in light of *City of Riverside v. Rivera*, 477 U.S. _____, 106 S. Ct. 2686 (1986). *City of McKeesport v. Cunningham*, _____ U.S. _____, 106 S. Ct. 3324 (1986).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 19, 1984, be and the same is hereby reversed and the cause remanded for further proceedings consistent with the original panel decision reported at 753 F.2d 262 (3d. Cir. 1985).

Costs taxed against the appellees.

Attest:

SALLY MRVOS
Clerk

DEC 12 1986

Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984

In The

UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

Civil Action No. 81-1434

REBECCA L. CUNNINGHAM, an Individual,
Plaintiff,

v.

THE CITY OF McKEESPORT, WILLIAM WEISSERT, SAMUEL R. VIDNOVIC, GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES HEATHERINGTON, CHARLES A. SHARBAUGH, NICHOLAS J. SKEZAS, CAROLYN O. YOUNG and ROBERT CLYDE OMSLAER t/d/b/a OMSLAER WRECKING COMPANY,
Defendants.

MEMORANDUM OPINION

This action arose from the demolition of a house and garage without affording the owner notice or an opportunity to be heard. On August 15, 1983 a judgment for the plaintiff for $17,000 was entered. On November 29, 1983 James R. Cooney, counsel for plaintiff, moved for $33,887.50 in fees and $781.05 in costs under 42 U.S.C. §1988.

Local Rule 33 requires motions for attorney's fees to be filed within ten days after the entry of judgment, unless otherwise required to be filed prior to the entry of

judgment. This rule was effective September 15, 1983. Because the effective date of this rule was after the entry of judgment in this case, the time limitations of the rule are not applicable to this case.

In determining a fee award the Court first determines the number of hours that should reasonably have been devoted to the case. In the present case plaintiff's theory of liability and measure of damages were straightforward and no affirmative defenses were timely raised. Taking into consideration the experience of counsel, as discussed below, nonetheless the 318.5 hours spent were excessive and duplicative. The hours claimed for certain tasks will be reduced as follows:

Appendix—Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984.

	Hours Claimed	*Hours Allowed*
Research	86.5	60.75
Draft complaint	12.5	6
Preparation of filing and service documents	3.25	1
Draft interrogatories and requests for production, which were not served	1.5	0
Review of discovery	1.25	0
Status conference	1.5	.5
Draft motion to compel	1.5	.5
Pretrial conference	3.75	1
Draft supplemental pretrial statement	3	1
Draft trial brief	9.5	4
Discussions with partners	9.5	0
Miscellaneous correspondence with witnesses	7	0
Trial	32	22
Discussion and research on appeal, which was not taken	4.5	0
Miscellaneous correspondence	7.5	0

Additionally, the 11.5 hours claimed for W. Thomas Laffey, Jr. will be disallowed as duplicative of Mr. Cooney's work. Thus the compensable hours are 318.5 minus 99.5 or 219.

Second, the Court determines a reasonable hourly rate. Plaintiff's counsel is a recent graduate of law school and recent member of the Bar. His relative inexperience is reflected in the number of hours devoted to this action. In *Ursic v. Bethlehem Mines*, 719 F.2d 670, 674 (3d Cir. 1983) the United States Court of Appeals for the Third Circuit took judicial notice that in the Western District of Pennsylvania a $100 hourly rate reflects a fee charged by able and experienced counsel. In the present case the reasonable hourly rate is $50. This amount encompasses some lawyering activities which would command a higher rate, such as trial time, and some which would command a lower rate, such as investigation and clerical tasks.

Multiplying the reasonable number of hours (219) times the reasonable hourly rate ($50) the lodestar is $10,950. The lodestar will not be adjusted for contingency or quality. There were no novel or complex legal or factual issues. At the outset plaintiff had a good prospect for recovery. Thus a contingency adjustment is not warranted. Plaintiff's counsel showed that degree of skill expected of lawyers of the caliber reflected in the reasonable hourly rate. Thus a quality adjustment is not warranted.

The *Lindy* amount as calculated above will be subject to a post-*Lindy* discretionary adjustment. *See, Ursic v. Bethlehem v. Mines*, 719 F.2d at 677. Plaintiff's counsel did not successfully advance new law which might serve

the public interest in the future. The decision affected only an individual plaintiff who was subject to an isolated act of deprivation for which she was adequately compensated. There was no indication of bad faith in the defense of the action. *See Swicker v. William Armstrong & Sons, Inc.*, 484 F.Supp. 762, 766 (E.D. Pa. 1980). In light of these considerations, a reduction of the *Lindy* amount by 50% to $5475 is fair and equitable in this case.

The hours spent for the prosecution of the fee petition exceeded those that should reasonably have been devoted to this task. The 15 hours claimed will be reduced to 8 hours and counsel awarded $400 for the prosecution of the fee petition.

Plaintiff's counsel will be awarded $5875 in fees and $781.05 in costs. Plaintiff had entered into a contingent fee agreement under which counsel was to receive one-third of the net amount of the award, after the payment of costs. The reasons supporting the post-*Lindy* downward adjustment indicate that this is not an appropriate case for a dual recovery. Accordingly plaintiff's obligations under the fee agreement are deemed satisfied in full by the statutory fee award. *See Sullivan v. Crown Paper Board Co., Inc.*, 719 F.2d 667 (3d Cir. 1983).

An appropriate order shall issue.

Dated: March 19, 1984.

HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
Chief United States District Judge

Appendix—Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984.

ORDER

AND NOW March 19, 1984 in accordance with the foregoing memorandum opinion, IT IS HEREBY ORDERED that plaintiff's counsel is awarded $5875 in fees and $781.05 in costs.

HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
Chief United States District Judge

cc: James R. Cooney, Esq.
Nernberg and Laffey
301 Smithfield Street
Pittsburgh, PA 15222

William Acker, Esq.
McCrady-Nicklas Building
Pittsburgh, PA 15219

Deborah D. Olszewski
Attorney at Law
1207 Fifth Avenue
Pittsburgh, PA 15219